HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 29

on appeal from:[2008] EWCA Civ 624

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Hanoman (FC) (Respondent) *v* London Borough of Southwark (Appellants)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Christopher Heather

(Instructed by London Borough of Southwark)

Respondent:
Richard Drabble QC
Dominic Preston

(Instructed by Glazer Delmar)

Hearing date:

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ON
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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. I have had the benefit of reading in draft the speech of my noble and learned friend Lord Scott of Foscote and for the reasons that he gives I would dismiss this appeal.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. For the reasons he gives, with which I agree, I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

3. Part V of the Housing Act 1985 introduced a significant benefit for, among others, local authority tenants who had occupied their dwellings for at least three years. They were given the right, in the case

of a house, to buy the freehold or, in the case of a flat, to buy a long lease. The price to be paid was the value of the dwelling less a substantial discount the amount of which depended on the length of time the tenant had been occupying the dwelling.

4. Many local authority tenants were, and are, entitled to housing benefit as a contribution towards, or sometimes in complete payment of, their weekly rent. Once they owned their own homes their entitlement to housing benefit, the cost of which was borne largely by central government, would come to an end. So, having regard to the discounts which enabled the tenants to purchase their homes at a price considerably less than their market value, the right-to-buy scheme had the effect of reducing the financial demands on central government while at the same time reducing the value of the assets of local authorities. Bearing in mind the resulting reduction in the housing stock owned by local authorities and the increasing difficulties of many local authorities in satisfying the housing demands made upon them, the right-to-buy scheme was politically highly controversial. It was a flagship in the then Conservative administration's legislative programme and its introduction was strenuously opposed by the Labour opposition.

5. Whether it was in order to discourage any politically motivated dragging of feet by hostile Labour controlled Councils or on account simply of second thoughts, the statutory right-to-buy scheme was amended in 1988 by the insertion of provisions which, in the event of delay by landlord Councils in responding to right-to-buy applications, provided for reductions in the purchase price payable for the dwelling over and above the discounts provided for in the 1985 Act. The issue in the present case is as to the proper construction and effect to be given to these provisions.

6. The respondent to the appeal, Mr Hanoman, was the tenant of a flat at 83 Northfield House, Peckham Park Road, London SE15. His landlord was the appellant Council, the London Borough of Southwark. It is not in dispute that Mr Hanoman was entitled under section 118 of the 1985 Act to the statutory right-to-buy in respect of his flat.

7. A right-to-buy is triggered by the service on the landlord of a notice that the tenant is claiming the right-to-buy (s.122). Mr Hanoman served a section 122 right-to-buy notice on the Council on 31 October 1999. However a dispute then arose between the Council and Mr

Hanoman as to whether Mr Hanoman had withdrawn his notice. The Council said that he had; Mr Hanoman said that he had not. A prolonged impasse followed which was eventually resolved in the High Court on 22 June 2004 when Peter Smith J made a declaration that Mr Hanoman's application to exercise his right-to-buy was still subsisting and that the Council was under a duty to deal with it: *Hanoman v Southwark London Borough Council* [2004] EWHC 2039 (Ch), [2005] 1 All ER 795. In the meantime the statutory provisions for dealing with delay had been invoked. I must describe those provisions and the steps taken thereunder by Mr Hanoman and the Council respectively.

8. Section 124 of the Act requires a landlord on whom a section 122 right-to-buy notice has been served to serve, within four or eight weeks thereafter (depending on the circumstances), a notice on the tenant stating whether the landlord admits or denies the tenant's right-to-buy. This the respondent Council had not done. They contended that the right-to-buy notice had been withdrawn, in which case their obligation to serve a section 124 notice would not have arisen. But the Council lost on that point in the High Court.

9. Section 153A(1) of the Act, as inserted by section 124 of the Housing Act 1988, entitles the tenant, where the landlord has failed within the applicable period to serve a section 124 notice, to serve on the landlord a "notice of delay". The notice of delay must specify a period, not less than one month, "within which the service by the landlord of a counter notice under sub-section (3) will have the effect of cancelling the initial notice of delay" (s.153A(2)). Mr Hanoman served a notice of delay on the Council on 24 March 2003. It is not now contended that the notice was for any reason ineffective. No counter notice was served by the Council. They were, in 2003, still contending that Mr Hanoman's section 122 notice had been withdrawn, in which case, of course, his section 153A notice of delay would have been of no effect.

10. Section 153A(5) of the Act applies where the tenant has served on the landlord a notice of delay and the landlord has not, within the specified period, served a sub-section(3) counter notice. Where sub-section (5) applies the tenant may serve on the landlord an "operative notice of delay" "which shall state that section 153B will apply to payments of rent made by the tenant on or after the default date." The "default date", for the purposes both of section 153A and section 153B, is the end date of the period specified in the tenant's notice of delay as the period within which the landlord can serve a counter notice. Mr Hanoman, on 23 May 2003, served on the Council a subsection (5)

operative notice of delay. It is not contended that, in the circumstances that had happened, the notice was not an effective notice.

11. Section 153B of the Act comes, therefore, into play. The section, so far as relevant to this appeal, provides as follows:

> "(1) Where a secure tenant has served on his landlord an operative notice of delay, this section applies to any payment of rent which is made on or after the default date or, as the case may be, the date of the service of the notice and before the occurrence of any of the following events (and if more than one occurs, before the earliest to occur) –
>
> (a) the service by the landlord of a counter notice under section 153A(3)
>
> ……
>
> (2) …… so much of any payment of rent to which this section applies as does not consist of –
>
> (a) a sum due on account of rates or council tax, or
>
> (b) a service charge …
>
> shall be treated not only as a payment of rent but also as a payment on account by the tenant which is to be taken into account in accordance with subsection (3).
>
> (3) In a case where subsection (2) applies, the amount which, apart from this section, would be the purchase price … shall be reduced by an amount equal to the aggregate of –
>
> (a) the total of any payments on account treated as having been paid by the tenant by virtue of subsection (2); and
>
> (b) if those payments on account are derived from payments of rent referable to a period of more than 12 months, a sum equal to the appropriate percentage of the total referred to in paragraph (a).
>
> (4) In subsection (3)(b) 'the appropriate percentage' means 50 percent …."

12. The issue in this appeal is what constitutes a "payment of rent" for the purposes of section 153B, or, more particularly, whether the crediting to a tenant's rent account of housing benefit constitutes a "payment of rent" for those purposes. I must refer to a few further relevant facts of this case before returning to that issue.

13. The Council, on 2 July 2004, following their failure in the High Court proceedings and Peter Smith J's declaration of 22 June 2004, served a section 124 counter notice on Mr Hanoman admitting his right-to-buy. This counter notice, brought to an end the period during which payments of rent fell to be treated as payments on account of the price payable by Mr Hanoman for a long lease of his flat.

14. On 15 September 2004, subject to the effect of section 153B, £17,000 was agreed as the price payable by Mr Hanoman. The market value of the flat on 12 November 1999 was £55,000, the statutory discount available under section 129 of the Act was £38,000. So the price was £17,000. The issue regarding section 153B remained outstanding. The Council contended that crediting housing benefit against rent was not the payment of rent. There were also other bones of contention between the parties that delayed completion of the purchase but, I am happy to say, none is still alive before your Lordships.

15. On 13 June 2005 the Council granted Mr Hanoman a lease of the flat at a premium of £17,000. It had been agreed, however, between the Council and Mr Hanoman that this completion of the right-to-buy transaction would not prejudice Mr Hanoman's right to apply to a court to have the section 153B issue resolved. It is accepted also that if Mr Hanoman is correct on that issue the whole of the £17,000 premium falls to be treated by section 153B(3) as having been paid by Mr Hanoman as payments on account made in the period between the default date and the service of the Council's section 124 counter notice. The Court of Appeal, having found in favour of Mr Hanoman, ordered the Council to repay the £17,000 with interest.

16. There is one further feature of the statutory right-to-buy scheme to which I should refer before turning to the critical issue. Section 155 of the statutory scheme, as enacted by the 1985 Act, provided that, if the purchasing tenant should sell the house or flat in question within three years of acquiring it, the tenant had to repay to the selling local authority a percentage of the discount off market value that the tenant had obtained. The three years was subsequently, by amendment, raised to five years but, for the purposes of Mr Hanoman's transaction with the Council, three years was the applicable period. A new subsection, subsection (3A), was added to section 155 as part of the 1988 amendments that had included also sections 153A and 153B. Subsection (3A) applies where a tenant has served on the landlord an operative notice of delay and provides that in that event the period during which, if the tenant having exercised his right-to-buy should sell,

the tenant becomes liable to pay the landlord a percentage of the discount should "begin from a date which precedes the date of the conveyance of the freehold or grant of the lease by a period equal to the time … during which, by virtue of section 153B, any payment of rent falls to be taken into account in accordance with subsection (3) of that section." Subsection (3A), therefore, imposed a potential further financial penalty on a dawdling local authority if the purchasing tenant should decide on an early re-sale of the house or flat he had acquired.

Housing benefit

17. Section 123 of the Social Security Contributions and Benefits Act 1992 established various "income related benefits". One of these is housing benefit. Under section 130 of the Act a person who meets the means test created by the section is entitled to housing benefit "if . . . he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home." The amount of the benefit will cover the whole amount of the rent if the claimant's income does not exceed a specified level. If it does, a diminishingly smaller amount of rent will be covered. In Mr Hanoman's case the whole of the rent for his flat was covered.

18. The manner in which housing benefit is paid is governed by section 134 of the Social Security Administration Act 1992 ('the Administration Act'), as amended by section 121 of and paragraph 1 of Schedule 12 to the Housing Act 1996 and section 127(1) of and paragraphs 34 and 35(1) of Schedule 7 to the Local Government Act 2003. Section 134(1) says that housing benefit "shall be funded and administered by the appropriate housing authority or local authority." That authority, in Mr Hanoman's case, was the Council. The language of subsection (1) suggests that it will be the local or housing authority that must bear the cost of the housing benefit scheme. That is not, however, the case. Housing benefit has always been, and is, heavily subsidised by central government. The subsidy, provided for by sections 140A to 140G of the Administration Act (as inserted by section 121 of and paragraph 4 of Schedule 12 to the Housing Act 1996) and by subordinate legislation, covers 95 per cent of housing benefit.

19. Subsection (1A) and (1B) of section 134 says that

> "(1A) Housing benefit in respect of payments which the

occupier of a dwelling is liable to make to a housing authority *shall* take the form of a rent rebate or …. ;

(1B) In any other case housing benefit shall take the form of a rent allowance …" (emphasis added).

Subsection (2) of section 134 provides that

> "The rebates and allowances referred to in subsections (1A) and (1B) above may take any of the following forms, that is to say –
>
> (a) a payment or payments by the authority to the person entitled to the benefit;
> (b) a reduction in the amount of any payments which that person is liable to make to the authority by way of rent; or
> (c) such a payment or payments and such a reduction;
>
> and in any enactment or instrument (whenever passed or made) 'pay', in relation to housing benefit, includes discharge in any of these forms."

20. In Mr Hanoman's case subsection (1A) applied and the housing benefit to which he was entitled took the form, therefore, of a rent rebate, not a rent allowance. The rent rebate reduced to nil the amount of the weekly rent that he was liable to pay to the Council.

The section 153B issue

21. It is accepted by the Council that, if Mr Hanoman's housing benefit had taken the form, in whole or in part, of a rent allowance paid to him by the Council and he had then paid to the Council the rent for which he was liable, he would have made payments of rent for section 153B purposes. But it is submitted that crediting housing benefit to his rent account by way of rebate in reduction of the rent due cannot be described as a *payment* of rent and does not entitle Mr Hanoman to the benefit of, or subject the Council to the detriment imposed by, section 153B. The purpose of section 153B(2) is, it is submitted, to compensate a tenant for having had to pay rent during the period of delay, not to provide the tenant with a windfall by restoring to him something he has

never had. Mr Heather, who appeared for the Council, argued that in the context of section 153B the word "payment" contemplated the movement of money from the tenant to the landlord. He argued also that the payment had to be a payment of 'rent'. Housing benefit is not 'rent' and the application of housing benefit in reduction of rent does not transform it into rent.

22. Mr Heather gave other examples of credits which might be made to a tenant's rent account in reduction of rent for which the tenant was liable but which, He said, could not be described as payments of rent. One such example was an award to a tenant of damages against a local authority landlord for breach of repairing obligations. It was, he said, often the case that such damages would be credited to the tenant's rent account rather than paid to the tenant. Such credits, he said, would not amount to payments of rent for section 153B purposes. I am unable to agree. First, the crediting of the damages to the tenant's rent account could only be done with the tenant's consent. Absent a successful set-off defence, a judge would have no power that I know of to impose such a thing on a successful claimant in a damages action. If and to the extent that the damages were then applied in discharge of rent due from the tenant the local authority would be acting as the tenant's agent in so doing. The application of the damages in these circumstances would be no different from a payment of the damages to the tenant and the application of the money by the tenant in payment of rent due. And, although your Lordships do not need to decide the point, the same would, in my opinion, be so in the case of a successful set-off defence by the local authority. To the extent that no rent was at the time due, any damages money retained by the local authority with the consent of the tenant would be held on behalf of the tenant, earmarked to be applied in discharge of future rental liability and, when so applied, would to my mind be applied on behalf of the tenant in payment of rent due from the tenant. Mr Heather's other example, a payment by the tenant of £5000 to his rent account whilst continuing to pay his current rent as it falls due, is too far fetched to be taken seriously but in any event leads nowhere. Unless and until the £5000 were applied in discharging a rent liability, it would clearly not count as a payment of rent. As and when it was so applied I can see no reason whatever why it would not count as a payment of rent. The local authority would have become, so to speak, the banker for the tenant.

23. The strength, and, if I may respectfully say so, I think the only strength, of the Council's case is that the housing benefit could never have been paid as a rent allowance to Mr Hanoman. Section 134(1A) stands in the way. The only question, as it seems to me, is whether the

periodic crediting to a tenant's rent account of a sum of money that could not have been paid to the tenant but that is credited to the rent account for the purpose of reducing or, as in this case, discharging the periodic rent liability of the tenant, can be described as a payment of the rent thus reduced or discharged for the purposes of section 153B.

24. The answer to that question is, in my opinion, that it can be so described. First, the word "payment", as Mr Heather accepts, varies with the context in which it is used (*White v Elmdene Estates Ltd* [1960] 1 QB 1, per Lord Evershed MR at 16: "the word 'payment' in itself is one which, in an appropriate context, may cover many ways of discharging obligations").

25. Secondly, the purpose of sections 153A and 153B was to provide a sanction that penalised any local authority that dragged its feet and delayed giving effect to a tenant's attempts to exercise his or her right-to-buy. The literal and limited meaning sought to be attributed to "payment of rent" in section 153B would enable a local authority to avoid that sanction where the tenant desirous of exercising the right-to-buy was entitled to housing benefit. This construction would fail to give effect to the purpose of the sections.

26. Thirdly, as Mr Drabble QC, counsel for Mr Hanoman, has pointed out, the literal construction of the expression "payment of rent" in section 153B contended for by the Council produces anomalous differences between tenants entitled to housing benefit whose landlords, such as local authorities and New Town Corporations, can provide housing benefit by rent rebate, and those whose landlords, such as housing associations Urban Development Corporations, Housing Action Trusts or Housing Co-Operatives, cannot do so. The latter class of tenants, whose housing benefit has to be provided to them by payment of rent allowances, would be entitled to the benefit of section 153B. The former, whose housing benefit takes the form of a rent rebate, would not. This difference seems to me unprincipled, to be one that is not supported by any discernible policy and cannot be supposed to reflect any Parliamentary intention.

27. For all these reasons I would reject the literal construction of "payment of rent" that is contended for and conclude that the crediting of housing benefit to the rent account of a local authority tenant as required by section 134(1A) of the Administration Act is a payment of

rent for the purposes of section 153B of the Housing Act 1985. I would, therefore, dismiss this appeal.

LORD RODGER OF EARLSFERRY

My Lords,

28. I have had the advantage of considering the speech of Lord Scott of Foscote in draft. For the reasons he gives, and in particular having regard to the anomalous and unprincipled distinctions that would otherwise arise among tenants of different landlords, I am satisfied that the literal approach advocated by the Council should be rejected. I would accordingly dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

29. I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Scott of Foscote. I agree with it and for the reasons he gives I too would dismiss the appeal.